STATE OF WISCONSIN

IN SUPREME COURT

No. 2012AP2067

MADISON TEACHERS, INC., PEGGY COYNE, PUBLIC EMPLOYEES LOCAL 61, AFL-CIO, and JOHN WEIGMAN,

Plaintiffs-Respondents,

v.

SCOTT WALKER, JAMES R. SCOTT, JUDITH NEUMANN and RODNEY G. PASCH,

Defendants-Appellants.

ON APPEAL FROM THE DECISION AND FINAL ORDER DATED SEPTEMBER 14, 2012, IN DANE COUNTY CIRCUIT COURT CASE 11-CV-3774, THE HONORABLE JUAN B. COLAS, PRESIDING

MEMORANDUM OF DEFENDANTS-APPELLANTS IN SUPPORT OF EMERGENCY MOTION TO STAY PENDING APPEAL

INTRODUCTION

On October 21 and 25, 2013, the Circuit Court breathed new life into its September 14, 2012, declaratory judgment by granting for the first time injunctive relief as a remedial contempt sanction for statewide effect. The Circuit Court took this unprecedented action, despite the clear language from the Court of Appeals' two orders that its declaration was not a mandate and did not have binding statewide effect on non-parties.

Due to these following extraordinary circumstances, Defendants-Appellants (hereafter "state officials") move this Court on an emergency basis for a stay of the Circuit Court's order that declared certain statutory provisions of the Municipal Employment Relations Act, Wis. Stat. §§ 111.70 to 111.77 (hereafter "MERA"), and other state statutes concerning municipal sector

collective bargaining, in violation of the state constitution.[1]

BACKGROUND

On September 14, 2012, the circuit court issued an order declaring: "Wis. Stat. §§ 66.0506, 118.245, 111.70(1)(f), 111.70(3g), 111.70(4)(mb) and 111.70(4)(d)(3) violates the Wisconsin and United States Constitution, and Wis. Stat. § 62.623[2] violates the Wisconsin Constitution, and [are] all null and void." (R. 53 (hereafter "Final Order").) Despite the plaintiffs seeking both declaratory *and injunctive* relief, the Circuit Court did not issue an injunction ordering the state

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[1] This case involves a pending appeal before this Court, scheduled for oral argument on November 11, 2013. The issues have been fully briefed by the parties. Accordingly, the Defendants-Appellants provide only a synopsis of the background of this case as is pertinent to this motion for stay pending appeal.

[2] The state officials did not seek a stay in the lower courts of the Circuit Court's Order declaring Wis. Stat. § 62.623, which prohibits first class cities, such as the City of Milwaukee, from paying the employee contribution to the City of Milwaukee Retirement System, unconstitutional. This motion for stay concerns all other statutes declared unconstitutional by the Circuit Court, however.

officials to take any action or refrain from taking any action.

When the state officials appealed that Final Order, they sought a stay first from the Circuit Court and then the Court of Appeals. (R. 55, 56, 61, 62, 63.) Both courts denied the stay.

Importantly, the Court of Appeals decision relied in part on its rejection of the view that the Final Order had statewide effect and applied to non-parties:

> [Plaintiffs-Respondents] next point to cases stating that when a statue has been declared unconstitutional on its face, it is to be treated as null and void from its inception. ***State v. Wood***, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63 (2010). But none of the cases brought to our attention involve the question whether this proposition means that a decision of a circuit court has binding effect on non-parties, or, for that matter, on a party with respect to other controversies. **In sum, none of the authorities cited by the unions for these two propositions directly address the questions of which if any non-parties are bound, and to what**

> **extent parties are bound in other controversies, by a circuit court decision declaring a statute void ab initio on the grounds that it is facially unconstitutional.**

(Court of Appeals Order, Dec. 28, 2012, p. 3) (emphasis added.)

That reasoning was essential to the Court of Appeals' denial of the stay, as the application of the order weighed significantly in the balance of harm analysis. Because the Court of Appeals' March 12, 2013, decision indicated the Final Order of the Circuit Court did not have statewide effect, the state officials chose not to file a motion to stay at this time with this Court, and the WERC Commissioners applied the Final Order only with respect to the Plaintiffs-Respondents (hereafter "the challengers") pending appellate review.

This week, on October 21, 2013, the Circuit Court issued a contempt ruling from the bench on behalf of non-party movants based on the

Commissioners' non-application of the Final Order with respect to non-parties. The Circuit Court ordered the Commissioners to stop enforcing the MERA statutes declared unconstitutional as to any non-parties in other controversies. (11CV3774, Dane County, Consolidated Court Automated Program (CCAP), entry of October 21, 2013; Affidavit of Steven C. Kilpatrick, ¶ 5, Ex. 1 (Transcript of Hearing, October 21, 2013, pp. 52-53).) On October 25, 2013, the Circuit Court entered its written order on contempt. (Kilpatrick Aff., ¶ 9, Ex. 5.)[3]

This contempt order has thus put a halt to the upcoming annual certification elections during which represented school district employees choose whether to certify an exclusive representative for collective bargaining purposes with school district employers. Wisconsin law

[3] On this date, the state officers, in the underlying action (Appeal No. 2012AP2067), have filed with the Supreme Court a motion to stay the Circuit Court's September 14, 2012, Final Order pending appeal.

mandates that those elections, which require almost thirty days to prepare and hold, be conducted by December 1 every year. Wis. Stat. § 111.70(4)(d)3.b.

In light of the Circuit Court's interpretation of its September 14, 2012, Final Order as amounting to a statewide injunction, the state officials now seek an emergency stay of that order so that it is clear that these elections can go forward. If the relief is not provided by **November 4**, those elections cannot take place this year.

ARGUMENT

A stay pending appeal is appropriate when the moving party: (1) makes a strong showing that it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantial harm will come to other interested

parties; and (4) shows that a stay will do no harm to the public interest. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). These factors are "interrelated considerations that must be balanced together," not prerequisites. *Id.* More of one factor excuses less of another, especially when there is high probability of success on the merits. *Id.* at 441.

Here, the *Gudenschwager* factors support the grant of an emergency stay pending appeal.

I. THE STATE OFFICIALS ARE LIKELY TO SUCCEED ON THE MERITS.

The state officials have a strong likelihood of success on the merits. "Since regularly enacted statutes are presumed to be constitutional, we conclude that, for purposes of deciding whether or not to grant a stay pending appeal, the State has made a strong showing that it is likely to succeed on the merits of its appeal . . . . Consequently, this factor weighs in the State's favor."

Gudenschwager, 191 Wis. 2d at 441 (internal citation omitted).

Because briefs on the merits of the appeal have been submitted to the Court and are available for the Court's inspection, the state officials will not argue in detail the merits in this memorandum. In brief summary, the Constitution only protects the right to associate for the purposes of exercising a constitutional right. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (the right to associate is protected only if it is for the purpose of "engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion."). There is no constitutional right to collective bargaining. *Dep't of Admin. v. Wis. Emp. Rel. Comm'n,* 90 Wis. 2d 426, 430, 280 N.W.2d 150 (1979) ("There is no constitutional right of state employees to bargain collectively.").

Courts have repeatedly rejected arguments that the Constitution somehow prohibits legislative determinations that make collective bargaining agents less powerful or labor associations less attractive to join because of a change to a collective bargaining law. *See Ysursa v. Pocatello Educ. Ass'n,* 555 U.S. 353 (2009); *Smith v. Arkansas State Highway Employees, Local 1315,* 441 U.S. 463 (1979); *Lincoln Fed. Labor Union No. 19129, A.F. of L. v. Nw. Iron & Metal Co.*, 335 U.S. 525 (1949).

Importantly, since the Circuit Court's Final Order, three court decisions now have upheld the Act 10 amendments to MERA, and its state counterpart, the State Employment Labor Relations Act, Wis. Stat. §§ 111.81 – 111.94, ("SELRA").

In *Wis. Educ. Ass'n Council v. Walker, et al.,* 705 F.3d 640 (7th Cir. 2013), the Seventh Circuit Court of Appeals upheld in their entirety the Act

10 amendments to both MERA and SELRA under the First Amendment and Equal Protection Clause of the Fourteenth Amendment of the federal constitution.[4]

Following that decision, in *Laborers Local 236, et al. v. Walker, et al.*, No. 11-cv-462, 2013 WL 4875995 (W.D. Wis. Sept. 11, 2013), the district court dismissed the complaint of two labor unions challenging the Act 10 amendments to MERA. The district court rejected plaintiffs' claim that Act 10's restrictions on collective bargaining improperly burden municipal employees' right to associate, assemble and express their views in concert in violation of the First Amendment. *Id.* at *1. Thus, in two direct challenges under the

[4] Incredibly, many of the *successful non-party movants* on the contempt motion before the Circuit Court were the *unsuccessful plaintiffs* in *Wis. Educ. Ass'n Council v. Walker, et al.*, Case No. 11cv428, before the United States District Court for the Western District of Wisconsin, and, ultimately, before the Seventh Circuit Court of Appeals in *Wis. Educ. Ass'n Council, et al. v. Walker, et al.*, Appeal Nos. 12-1854, 12-2011, and 12-2058.

First Amendment and Equal Protection Clause, the federal courts have upheld post-Act 10 MERA.

Most recently, on October 23, 2013, the Dane County Circuit Court rejected a state constitutional challenge to post-Act 10 SELRA[5] brought by a labor union under the same state constitutional provisions as in this case using the same legal theories as the challengers here. *Wisconsin Law Enforcement Association, et al. v. Walker, et al.*, Case No. 12cv4474.[6]

Because of the presumption of constitutionality, confirmed by every court deciding an Act 10 challenge since the Circuit Court issued its Final Order, the state officials have a very strong likelihood of success on the

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[5] Wisconsin courts analyze MERA and SELRA identically. *Dep't of Emp. Rel. v. Wis. Emp. Rel. Comm'n*, 122 Wis. 2d 132, 143, 361 N.W.2d 660 (1985).

[6] The state officials have provided copies of these three decisions. (Affidavit of Steven C. Kilpatrick, October 25, 2013, ¶¶ 7-9, Ex. 2-4.)

merits. This factor weighs quite heavily in favor of the granting of a stay.

II. THE BALANCE OF HARMS FAVORS GRANTING AN EMERGENCY STAY.

The remaining *Gudenschwager* factors, which examine the competing harms to the parties, the public, and interested parties, also weigh in favor of an emergency stay.

A. Absent A Stay, There Will Be Irreparable Injury To The Public And The Commissioners.

Unless a stay of the Circuit Court's Final Order is granted, the public and the Commissioners will suffer irreparable injury.[7]

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[7] The Circuit Court's Final Order, a declaration, combined with the Circuit Court's order of contempt and sanctions, operates as an injunction of MERA. Whenever the State is prevented from enforcing its laws, it suffers irreparable injury. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Maryland v. King*, --- U.S. ----, 133 S. Ct. 1 (July 30, 2012) (Roberts, C.J., in chambers) (same); *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (same).

If a stay of the Final Order is not granted,[8] the Commissioners, in their official capacities acting as the Wisconsin Employment Relations Commission, will be unable to conduct the annual certification elections for represented school district general employees by December 1, 2013, per the Legislature's directive in Wis. Stat. § 111.70(4)(d)3.b. Additionally, the Commissioners must conduct certification elections for representatives of general municipal employees in bargaining units who are not school district employees no later than May 1 of each year. Wis. Stat. § 111.70(4)(d)3.b.

The Commission is prepared to conduct 401 separate school district employee certification elections involving a total of more than 60,000 voters all beginning at noon on November 1, 2013, and all ending at noon on November 21, 2013.

[8] The effect of this Court staying the Circuit Court's Final Order would render the contempt order unenforceable, since the source of the contempt is violation of that Final Order.

(Davis Aff. ¶ 3.) Each of the 401 elections required the Commission to obtain a separate proposed voter eligibility list from the affected school district employers, and to allow time for the affected collective bargaining agents to review the list and request changes to it. A voter list for each election has been electronically created by the Commission for use by the American Arbitration Association, the entity that manages the telephonic voting process.

If the elections are not held beginning on November 1, the Commission will be obligated to provide affected parties with 401 new notices providing the new election details. The Commission, school districts, and bargaining representatives will be obligated to compile new voter eligibility lists in each of the 401 elections to reflect changes in the composition of the workforce. The Commission states that such action must be completed by November 5 for the

elections to take place at all this calendar year within the statutory timeframe. If the elections are not completed by December 1, compliance with the statutory mandate will be impossible, and no election can be held under the statute.

The public will be harmed if it cannot be determined this year whether or not represented school district employees will continue to be represented by an exclusive agent for the purposes of negotiating contracts with local school district employers concerning total base wages. If there are no certified agents for collective bargaining units, the school district employers, not bound by the circuit court's orders, will very likely be confused as to whether collective bargaining can take place with a union claiming to be a certified agent from pre-Act 10 law. Essentially, the parties on one side of the bargaining table may claim the benefit of the circuit court's order, while

the parties on the other side may assert they are bound to follow Act 10.

Moreover, school district employees in collective bargaining units across the state possess the statutory right to decide whether or not to continue to keep their current representative for collective bargaining purposes, choose a new representative, or whether to have a representative at all. If the elections cannot take place, represented school district employees will have lost their only opportunity to cast their ballots this year. The loss of an opportunity to choose, by majority vote of the unit whether to have a collective bargaining agent and who it will be, is a separate but related substantial and irreparable public harm.

If the Final Order is not stayed, the annual certification elections for school district employees in collective bargaining units will not take place in 2013, as the Wisconsin Legislature has directed by

law. It is in the public interest to have the laws followed and enforced.

Unsurprisingly, in the few days since the Circuit Court's contempt order has issued, there is evidence of more confusion in the municipal collective bargaining arena.[9] A stay of the Final Order will allow MERA certification elections to take place and that confusion to be abated.

B. No Substantial Harm Will Come To Other Interested Parties.

Virtually every municipal employer in this state is an "other interested party" with respect to

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[9] The state officials direct the Court's attention to several recent media reports concerning reaction of various unions and municipal employers to the Circuit Court's contempt ruling:
Todd Richmond, "Wis. Employers Can Impose Terms Despite Ruling," ASSOCIATED PRESS, Oct. 23, 2013, http://www.sheboyganpress.com/viewart/20131022/SHE0101/310220415/Employers-can-impose-terms-despite-ruling;
Adam Rodewald, "Oshkosh Teachers Union Seizes Bargaining Opportunity After Court Ruling," OSHKOSH NORTHWESTERN, Oct. 22, 2013, http://www.thenorthwestern.com/article/20131022/OSH0101/310220318/Oshkosh-teachers-union-seizes-bargaining-opportunity-after-court-ruling;
Deneen Smith, "In Light Of Judge's Ruling, Unified To Resume Bargaining With Unions," KENOSHA NEWS, Oct. 23, 2013, http://www.kenoshanews.com/news/in_light_of_judges_ruling_unified_to_resume_bargaining_with_unions_473933807.html (all last visited October 24, 2013).

the circuit court's Final Order, as are all municipal employees who do not want union representation. The "interested parties" are not simply bargaining units.

Nevertheless, if the Final Order is stayed, no harm will come to the unions who have chosen to participate in the certification elections. As to those who have chosen not to participate, any harm would flow from their own decisions not to participate in the certification process. Any harm to these few entities is significantly outweighed by the harm that would come to the thousands of represented school district employees who will be unable to exercise their statutory right to cast ballots in the certification elections.

If this Court ultimately upholds the circuit court's September 12, 2012, Final Order and finds the statute unconstitutional, there is no harm to those who have participated in the elections: the election results can simply be put aside. The costs

of preparing for the election have already been undertaken by the many unions that chose to participate. If this Court reverses the circuit court's Final Order and upholds the law, the certification process will have been completed and the parties can conduct bargaining as provided for under the statutes.[10]

[10] Despite emergency rules for these elections (and others) creating Chapters ERC 70, 71, and 80 of the Wisconsin Administrative Code being approved *in July 2013*, the non-party movants waited until September 24, 2013, to file their contempt motion with the Circuit Court. Thus, the need for an *emergency* stay was not a creation of the state officials.

CONCLUSION

For the reasons set forth above, the state officials respectfully request that this Court grant their Motion to Stay the Circuit Court's September 14, 2012, Final Order.

Dated this 25th day of October, 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452
Attorneys for Defendants-Appellants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792
(608) 267-8906 (Fax)
kilpatricksc@doj.state.wi.us